Supreme Court, U.S.
FILED
JUL 30 2004
OFFICE OF THE CLERK

(3)

No. 03-1433

IN THE

Supreme Court of the United States

ROBERT W. RANN, PETITIONER

v.

ELAINE CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY, U.S. DEPARTMENT OF LABOR, HER AGENTS AND SUCCESSORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

I.

The District of Columbia Circuit noted a clear split between the Third, Seventh, and Eighth Circuits versus the D. C Circuit on the issue of whether the statutory requirement of notice to a federal agency under 29 U.S.C. §633a(d) is satisfied when the complaint is filed directly with the agency. The courts of appeals' interpretations of 29 U.S.C. §633a(d) are not uniform. Pet. App. 11a-12a. The split among the circuits on this issue warrants granting *certiorari*. *Wilson v. Layne*, 526 U.S. 603, 608 (1999).

Respondent claims that analysis of *Bohac v. West*, 85 F.3d 306, 307 (7th Cir. 1996) is not persuasive. This argument is misplaced. The *Bohac* court analyzed the plain language of the statute and the prior cases and concluded that there is no reason to require notice to be directed through the EEOC. As the Seventh Circuit observed: "In light of the significant sharing of responsibilities between the EEOC and the agencies under the regulatory scheme, however, we believe that the goals of the 30 days' notice provision are sufficiently advanced through the filing of a formal administrative complaint." *Id.* at 310. *Bohac* correctly interprets the ADEA in holding that the notice requirements of §633a(d) are to be interpreted in light of the statutory purpose of giving notice to the agency and that the purposes of §633a(d) are satisfied when notice is given ***directly*** to the agency. This is a sound policy decision because filtering the request through the EEOC only delays the requisite notice to the agency.

Respondent concedes as much, but contends

review by this Court is not appropriate because the governing regulations changed, thereby overturning *Purtill v. Harris*, 658 F.2d 134, 138 (3rd Cir. 1981), and *McIntosh v. Weinberger*, 810 F.2d 1411, 1425 n. 6, (8th Cir. 1987), *vacated on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212, and *cert. denied*, 487 U.S. 1217 (1988). Brief for the Respondent in Opposition ("Opp.") at 9. This is incorrect because there was no substantive change in the applicable regulations. The only change in the relevant regulations was to provide the mailing address for notifying the EEOC of a complaint of age discrimination.[1] Further, the EEOC specifically stated that the agency did not intend to change the regulations or abrogate governing case law. 57 FR 12644 (April 10, 1992).

Respondent also argues that the Court should not accept review because of a timeliness issue in Rann's case. Opp. at 12-13. This is incorrect for two reasons. First, Rann timely satisfied the statutory notice requirement under 29 U.S.C. §633a(d) because, as respondent concedes, Rann filed an informal complaint on April 23, 1998 and then went through lengthy mediation. There is no claim the agency did not receive notice. There is no statutory requirement that a federal employee make an early decision to "forego the administrative grievance process" or that a federal employee cannot utilize both §633a(b) and §633a(d) to satisfy the statutory prerequisites for filing suit under the ADEA. There is no basis in the statute for imposing any additional requirement on Rann beyond

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[1] Respondent cites 29 C.F.R. 1613.214(a)(2) (1991) in support of its argument. This reliance is misplaced because these regulations do ***not*** address the processing of complaints of age discrimination.

providing notice of his claim to his agency.

Second, there is no reason to believe that the time for filing a complaint began to run from a letter to Rann dated March 16, 1998, advising him that he was not selected for the position, especially when it was postmarked nine days later. The time for filing cannot begin to run until Rann was placed on notice of facts indicating he had been the victim of discrimination. *See* Petition 19 n. 4. Rann did not know until he met with the selecting official on March 20, 1998 that he had been the victim of discrimination.[2]

Respondent states:

> "While notice to the agency's EEO office may in some instances be sufficient to meet the statute's initial goal of giving notice to all prospective defendants, the requirement that notice be made to the EEOC ensures that the agency does not misconstrue an intent to sue letter as a step in the administrative process." Opp. at 12.

The first clause of this sentence appears to concede that notice ***can***, as it did here, meet the statutory purpose, while the second clause is a *non sequitur*. Even if the agency "misconstrues" the notice letter "as a step in the administrative process," such result is beneficial to all parties because the agency can begin its own

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[2] Respondent's citation to *SEC v. Edwards*, 124 S. Ct. 892, 895 n* is unhelpful. Opp. at 13. Since the court of appeals analyzed the ruling below as a grant of summary judgment, Pet. App. 4a, Rann was entitled to correct the typographical error in the complaint.

investigation of the facts surrounding the complaint of discrimination more promptly.

Respondent also argues that notifying the EEOC "provides additional protection for the claimant by requiring the EEOC itself to act to eliminate discrimination at the agency." Opp. at 12. This argument lacks merit because the EEOC does not act to eliminate unlawful practices in federal agencies because that task is delegated to the agencies under 29 CFR §1614.102. The EEOC does not become involved in the complaints process until there is a hearing under 29 CFR §1614.109 or until there is an appeal to the Commission under 29 CFR §1614.401.

Rejecting the former practice of sending notice directly to the agency does not streamline the process. Rather, requiring notice be sent through the EEOC is a sterile formality that delays notice to the decision makers at the agency.

The EEOC was aware of *Stevens v. Department of Treasury*, 500 U.S. 1, 9-10 (1991), *Purtill v. Harris*, *supra*, *McIntosh v. Weinberger*, *supra*, and the practice under which federal employees gave notice directly to the agency. The EEOC's failure to notify federal employees that notice given directly to the agency no longer satisfied the requirements of §633a(d) must be read as ratification of the prior practice of giving notice to the agency and absence of any intent to change the current practice.[3]

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[3] In explaining Section 201(c) of the regulations, the EEOC stated: "Consequently, we moved the ADEA exhaustion of administrative remedies section to §1614.201. We did not make any changes to the substance of the section." 57 FR 12644 (April 10, 1992). The regulations proposed by then EEOC Chairman Clarence Thomas did not state any intention of abrogating the

Accordingly, the Court should grant the petition and resolve the split in the circuits over whether notice of intent to sue under 29 U.S.C. §633a(d) may be given directly to the employer or whether the notice must be channeled through the EEOC.

II.

Respondent's argument that Rann failed to exhaust his administrative remedies is flawed. The EEOC's decision in *Hwang v. Henderson*, Appeal No. 01983455, EEOC, Office of Federal Operations (April 29, 1999), 1999 WL 303871 (E.E.O.C.) provides the rule of decision, which binds the lower courts pursuant to the principles of *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Rann provided all information in his possession to the agency, which had adequate information to investigate the charges. The necessary information was in the hands of the agency, which never found that it could ***not*** investigate and stated only that it would be "useful" to have Rann resubmit information he previously provided.[4]

Further, under the EEOC's interpretation of its own regulations at 29 CFR §1614.201, the agency lacked the authority to dismiss a complaint after the passage of 180 days. *Koch v. Levitt*, 1997 WL 106419, at *5-6 (E.E.O.C.1997). The Court should grant the petition to reverse the lower courts' failure to follow

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prior practice. 54 FR 45747 (October 31, 1989).

[4] The agency never warned Rann that if he did not cooperate with the investigation that he would lose his right to go to court. We are aware of no court of appeals decision after *Stevens* in which a court dismissed a federal employee's age discrimination case for an alleged failure to cooperate in the administrative process.

Chevron and its progeny.

III.

The Court again rejected respondent's cramped view of this Court's teachings in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), in a decision issued after Rann filed his petition with this Court. *Scarborough v. Principi*, 124 S. Ct. 1856 (2004). In *Scarborough*, the Court applied the principles of *Irwin* and *Franconia Associates v. United States*, 536 U. S. 129 (2002), to a claim for attorney's fees brought under the Equal Access to Justice Act, 28 U.S.C.A. §2412(d)(1)(B).

Irwin involved a Title VII employment discrimination complaint against the federal government. *Irwin* rejected arguments for a special rule of construction for the federal government in assessing limitation issues where there is a waiver of sovereign immunity. In *Franconia Associates v. United States*, 536 U.S. at 145, the Court similarly rejected an "unduly restrictive" construction of the statute of limitations for claims filed against the United States under the Tucker Act, 28 U.S.C. §1491 (refusing to adopt a "special accrual rule" for commencement of limitations period against the government).

In *Scarborough*, the Court again rejected the argument by the United States that it should adopt special rules of statutory interpretation for claims asserted against the federal government. "Because many statutes that create claims for relief against the United States or its agencies apply only to Government defendants, *Irwin's* reasoning would be diminished were it instructive only in situations with a readily identifiable private-litigation equivalent." *Scarborough*, 124 S. Ct. at 1870.

Viewed in light of *Scarborough*, Rann's meeting

with Lillian Winstead, the head of EEO Operations for the Department of Labor, estopps the government from arguing Rann's complaint was properly dismissed. *See* 57 FR 12634, 12640 (April 10, 1992) ("As the agency charged with enforcing and administering the ADEA, it is entirely appropriate for EEOC to inform federal employees about their rights and to provide the best possible information."). Thus, Rann's reasonable reliance on Winstead's advice is binding on the agency.

The record below demonstrates not "obduracy" or "stonewalling," Pet. App. 8a, 9a, but Rann's reasonable reliance on Winstead, who arranged for Rann to obtain advice from a knowledgeable EEOC employee, the federal agency with expertise in this area. Pet. App. 45a-47a. Winstead was fully aware that Rann had already notified the agency by filing a complaint of age discrimination and engaging in lengthy mediation. The agency had a written report with numerous exhibits containing all of Rann's information and needed no more information from Rann to conduct its investigation.

Respondent notes that "this Court has long held litigants responsible for knowledge of both the United States Code and federal regulations." Opp. at 17. But this argument begs the question of what the law required.[5] Prior to this case, every circuit addressing the law concluded that notice to an agency is notice to the EEOC under 29 U.S.C. §633a. Prior to the decision of the D.C. Circuit, no court of appeals ever upheld the dismissal of a claim brought under the ADEA for

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[5] There was no dispute as to the meaning of the regulations in cases cited by respondent. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947) ("no question has been raised" regarding "the clear meaning of the regulation.").

failure to exhaust administrative remedies, and after this Court's decision in *Stevens v. Department of Treasury, supra,* Rann could not be required to expect a change in interpretation of the ADEA's notice requirements fashioned solely to dismiss his claims on the grounds he notified the agency directly, rather than through the EEOC. The decisions in *Purtill, McIntosh,* and *Bohac* are still good law and Rann reasonably relied on them to determine the requirements of the law and regulations governing notice under the ADEA.

Respondent's reliance on an earlier case, *Heckler v. Community Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 63 (1984), is misplaced for several reasons. First, the private citizen in that case suffered no adverse consequences from the rejection of his estoppel claim. As the Court noted, respondent did not lose "any legal right, either vested or continent or suffer[] any adverse change in its status" because the organization received benefits to which it was clearly not entitled. *Id.* at 61-62. Here, on the other hand, Rann changed his position in reliance on advice from the EEOC, obtained through the agency's EEO office and was denied his statutory right to file suit under the ADEA. "[W]hen the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Heckler, supra,* 467 U.S. at 60, n. 12 (citations omitted); *Moser v. United States,* 341 U.S. 41 46 (1951) (applicant cannot be deemed to waive right to citizenship on the basis of a form he signed when he was misled as to the effect signing would have on his rights).

Rann trusted and relied upon agency EEO headWinstead and it is fundamentally unfair to penalize him for relying on the agency's [and the EEOC's] advice. "It is very well to say that those who deal with

the Government should turn square corners. But there is no reason why the square corners should constitute a one way street." *Merrill, supra,* (Jackson, J., dissenting). "To say to these appellants, 'The joke is on you. You should not have trusted us' is hardly worthy of our great government." *Brandt v. Hickel,* 427 F.2d 53, 57 (9th Cir. 1970), quoted in *Heckler, supra,* at 61. Under the circumstances present here, Rann's reliance was reasonable.

In addition, the laws at issue in *Heckler* and *Merrill, supra* were clear. Neither private party was entitled to receive or retain the benefits received from the government. Here, on the other hand, there is considerable dispute regarding the requirements of the law, as evidenced by the split in the circuits.

The Court should grant the Petition to determine whether the D.C. Circuit was faithful to the mandate of *Irwin v. Veterans Affairs* and its progeny and resolve the apparent tension between *Irwin* and the earlier decision in *Office of Personnel Management v. Richmond,* 496 U. S. 414, 424-431 (1990) (federal government could not pay benefits which were not authorized by law denying payment of unauthorized funds). Because of its misreading of *Richmond,* a case dealing with the spending under the appropriations clause, the lower court plainly erred in imposing on Rann an excessive burden in his efforts to demonstrate estoppel. The Court should decide the important issue of when equitable estoppel is available against the federal government where there is an undisputed waiver of sovereign immunity.

CONCLUSION

The Court should grant the Petition to resolve the split in the circuits as to whether the statutory requirement of notice of intent to sue under the ADEA

is satisfied when given directly to the agency, or whether the federal employee is required to funnel that notice through the EEOC. The Court should also grant the Petition to resolve whether the agency properly cancelled Rann's administrative complaint after the passage of 180 days under EEOC's interpretation of the regulations, and whether the agency should be estopped from doing so.

Respectfully submitted,

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